

U.S. Department of Labor

Office of Administrative Law Judges
603 Pilot House Drive - Suite 300
Newport News, Virginia 23606-1904
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Tel (757) 873-3099 Fax (757) 873-3634



Date: January 12, 2001

Case Nos.: 1999-LHC-0673

OWCP Nos.: 5-103717

In the Matter of:

BETTY H. JEFFREY, (widow of FRANKLIN C. JEFFERY, Decedent),
Claimant,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Employer, Self-Insured.

Before: DANIEL A. SARNO, JR.
Administrative Law Judge

SUPPLEMENTAL DECISION AND ORDER
GRANTING ATTORNEY FEES

The Decision and Order awarding benefits was issued in the above-captioned case on October 3, 2000. On October 25, 2000, Counsel for Claimant, Gary R. West, Esq., filed a Petition for Award of Attorney's Fees in the amount of \$11,171.13, representing 35.01 hours at \$210 per attorney hour, and costs of \$3,819.03. On November 6, 2000, Counsel for Employer, Jonathan H. Walker, Esq. filed a request for additional time to respond, which was duly granted. On November 15, 2000, Employer's Counsel filed an Objection to Claimant's Petition for Award of Attorney's Fees.

Employer objects to awarding attorney's fees because the case is on appeal to the Benefits Review Board. Employer's Counsel also objects to Claimant Counsel's \$210 per hour billing rate. Additionally, Employer's Counsel objects to excessive charges on 07/13/98, 04/23/99, 04/30/99, 11/30/99 to 02/15/00, 03/23/00 and 03/24/00. Finally, Employer's Counsel objects to costs associated with the deposition of Dr. Cagle. Claimant's counsel did not submit a response to Employer's objections.

Employer's Counsel first objects to the court granting a fee petition while the case is pending appeal to the Benefits Review Board, citing that in the event the award is reversed, granting the fee petition "would be a total waste of judicial resources." Counsel further states that Employer "certainly would not pay until this matter is fully and finally litigated."

After carefully reviewing Employer's argument, the court concludes that it has jurisdiction to issue a supplemental order awarding attorney's fees while the compensation award on which the fee is based is before an appellate body, in accordance with *Norat v. Universal Terminal and Stevedoring Corp.*, 9 BRBS 875, BRB No. 78-830 (Jan. 30, 1979). While it is true that "an award is not final until the possibilities for review of the award have been exhausted," the court is not precluded from granting an award of attorney's fees, in the interest of efficient administration of the Act's provisions.¹ *Id.* The court also notes that the time period in which Employer chooses to pay the attorney's fee is of no consequence to the court's determination. Instead, it is the court's duty to determine whether attorney's fees are due, and if so, to determine the amount of the fee. The court is not required to consider the Employer's willingness to pay the fee when granting attorney's fees. Indeed, if the Employer's willingness to pay was a factor, virtually all fee petitions could be defeated. Therefore, the court finds that it has jurisdiction to consider an attorney's fee award at this time.

Employer's Counsel next objects to Claimant Counsel's hourly billing rate of \$210. The court notes that in setting the amount of an attorney's fee, the court should consider the number of hours worked, the results obtained, the complexity of the case, the quality of the services, the practitioner performing the services, and the prevailing rate for attorneys in the area. See *Paolo Tornabene v. Marine Repair Service, Inc., and U.S.P. & I. Agency, Inc.*, 12 BRBS 532 (July 25, 1980). Accordingly, the court takes notice that Claimant's Counsel spent approximately 35 hours on the case, and that Claimant received a sizable award as a result of Counsel's efforts. The court also notes that a death benefits claim arising from an occupational disease, in this case asbestosis, involves numerous complex issues. Additionally, Claimant's attorney is well known as a specialist in his field among attorneys in the surrounding area. However, the prevailing rate for attorneys in the area is not \$210 per hour. Furthermore, the court finds that a fee of \$7,352.10 for 35 hours of work is excessive. Therefore, given Claimant Attorney's expertise, the number of hours worked, the results obtained and the complexity of the case, the court awards Claimant's Counsel \$190 per hour.

Employer then objects to 2 hours of time spent on 07/13/98 for preparation of an LS-18. As Employer points out, an LS-18 is a one page document requiring minimal general information about a case which is readily available to Claimant's Counsel. A two hour time period is indeed excessive to fill out this

¹Employer may, however, appeal the attorney's fee award to the Benefits Review Board, or petition to prevent enforcement of the attorney's fee award until after the compensation award has become final. *Id.*

simple document. Accordingly, Claimant Counsel's fee will be reduced to reflect 0.25 hours spent in preparation of the LS-18.

Employer also objects to 3 hours of time spent on 04/23/99 and 04/30/99 to prepare and review responses to interrogatories with Claimant. Accordingly, Employer's request to reduce the amount of time billed to 1.5 hours is granted.

Employer further objects to the 10.67² hours spent in preparation for Dr. Cagle's deposition between 11/30/99 and 02/15/00. Employer requests that the time be reduced to 3 hours. After carefully reviewing Claimant Counsel's entries, the court finds that 1.15 hour on 11/30/99 is appropriate, but that the 01/13/00, 02/14/00 entries should be reduced to 1 hour each, and that the 02/15/00 entry should be reduced to 2 hours.

Employer objects to the 5.51³ hours spent in preparation for and taking the deposition of Dr. Legier. Employer requests that the total amount of time be reduced to 1 hour. After carefully reviewing Claimant Counsel's entries, the court finds that the 03/23/00 entry should be reduced to 2 hours, and that the 03/24/00 entry should be reduced to 1 hour.

Employer finally objects to the costs of \$318, \$185.99 and \$582.99 for conference room reservation, airline tickets and lodging associated with attending Dr. Cagle's deposition. The court notes that it is Employer's burden to show that the award of an attorney's fee, or any part thereof, is unreasonable. *See Rogers v. Ingalls Shipbuilding Corp.*, 28 BRBS 89 (Aug. 19, 1993). However, Employer presented no evidence on the reasonableness of these costs. The court has no basis for finding that these charges are unreasonable based on the evidence presented. Therefore, the court grants Claimant's Counsel the costs associated with attending Dr. Cagle's deposition.

After consideration of the issues involved, the degree of skill with which Claimant was represented, the amount of time and work involved,⁴ the risk of loss, and other relevant factors, it is concluded that

²Employer cites 12 hours in preparation. However, after review of the time sheet, it appears that Claimant's attorney spent merely 10.67 hours in preparation for Dr. Cagle's deposition. Even assuming that the 0.25 hour spent on 12/07/99 and 0.15 hour spent on 01/10/00 were in reference to Dr. Cagle's deposition, the total time amounts to 11.07 hours.

³Employer cites 4.5 hours for these tasks. However, after review of the time sheet, it appears that Claimant's attorney actually spent 5.51 hours on these tasks.

⁴After accounting for the above changes in billable hours, Claimant's attorney worked 30.13 hours on this case.

\$5,749.70⁵ constitutes a reasonable fee and is approved. Claimant's Counsel shall also receive the amount of \$3,819.03 for costs advanced to Claimant. The total fee in the amount of \$9,613.73,⁶ is assessed against the Employer, Newport News Shipbuilding and Dry Dock Company, pursuant to 20 C.F.R. §702.132.

ORDER

It is hereby ORDERED that Employer, Newport News Shipbuilding and Dry Dock Company, pay \$9,613.73 to Gary R. West Esq., for services rendered to the Claimant in this case.

DANIEL A. SARNO, JR.
Administrative Law Judge

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⁵This number equals \$190 per attorney hour times 30.13 hours, plus \$40 per paralegal hour times 1.75 hours.

⁶This number equals \$5,749.70 in fees, plus \$3,819.03 in costs.